IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

72-
No. [redacted]-1052

ROGERS C.B. MORTON, SECRETARY
OF THE INTERIOR,

PETITIONER

v.

RAMON RUIZ AND ANITA RUIZ,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CALIFORNIA INDIAN LEGAL SERVICES, AMICUS CURIAE

Lee J. Sclar
Bruce R. Greene
Herbert A. Becker
CALIFORNIA INDIAN LEGAL
SERVICES
2527 Dwight Way
Berkeley, California 94704

Amicus Curiae In
Support of Respondents

INDEX

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND REGULATIONS:

LEGISLATIVE HISTORY:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-1052

ROGERS C.B. MORTON, SECRETARY
OF THE INTERIOR,

PETITIONER

v.

RAMON RUIZ AND ANITA RUIZ,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CALIFORNIA INDIAN LEGAL SERVICES, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This case will decide whether statutes and the Constitution empower the Bureau of Indian Affairs to exclude off-reservation Indians from the Bureau's general assistance program.

California Indian Legal Services

(CILS) has a twofold interest in the outcome.

First, CILS represents the plaintiffs in Croy v. Morton, Civil No. S-2305, United States District Court for the Eastern District of California. Those plaintiffs assert the right of off-reservation rural California Indians to share in the BIA's housing improvement program. Housing improvement, like general assistance, is part of the BIA welfare program funded under 25 U.S.C. §13.

Croy was filed December 22, 1971. The district court has suspended all proceedings pending the disposition of this case.

California Indian Legal Services also has a more general interest in this case. Over 85,000 Indians in California live off-reservation -- a higher number than in any state except Oklahoma. Less than 15% of native California Indians and only 6% of all Indians in California live on reservations. Among those states with 20,000 or more Indians only Alaska and Oklahoma have a lower percentage of reservation residents. Morton v. Ruiz thus has enormous significance for poor California Indians to whom CILS provides

free legal assistance.

STATEMENT OF THE CASE[1]

Respondents Ramon and Anita Ruiz are husband and wife and members of the Papago tribe.

In 1940 they left the Papago Reservation to find employment. Ramon Ruiz was hired by a mining company in Ajo, Arizona, a town 15 miles away. The Ruizes settled in the part of Ajo populated almost entirely by Papagos and known as "Indian Village." The Ruizes have lived in Indian Village ever since. They have a minor daughter. Their principal language is Pagago.

From July 1967 to March 1968 a strike closed the mines where Ramon Ruiz is and has been employed continuously since 1940. Mr. Ruiz was unable to find other work. His sole income was $15 per week in union strike benefits. Mrs. Ruiz added $8 per week by working four hours per day, two days a week at $1 per hour. (A. 18-19.)

Mr. Ruiz sought state welfare. Because his $15 per week was from a union,

---

1. This statement of facts is based upon the Agreed Statement of Facts (A.45-48) and the Court of Appeals' opinion, Petition For A Writ Of Certiorari, Appendix A.

the Arizona Department of Public Welfare ruled Mr. Ruiz ineligible.

The Ruizes then applied for general assistance benefits from the Bureau of Indian Affairs. On December 13, 1967, the Bureau turned the Ruizes down. The sole reason was that Part 66, Section 3.1.4(A) of the Bureau of Indian Affairs Manual (hereinafter cited as BIAM) requires a general assistance recipient to live on a reservation except in Alaska and Oklahoma. An Indian striker and his wife residing on a reservation with a child and receiving Mr. Ruiz' union benefits plus the eight dollars a week Mrs. Ruiz received at her dollar an hour job would have been granted BIA general assistance. (A-21.)

After two fruitless administrative appeals the Ruizes filed suit on February 19, 1968. They claimed that 66 BIAM 3.1.4(A) is illegal and unconstitutional. The district court granted the Government a summary judgment without any opinion. The court of appeals reversed. It held that 66 BIAM 3.1.4(A) is inconsistent with the unambiguous terms of the Snyder Act, 25 U.S.C. §13, and is not sanctioned by later appropriation laws.

SUMMARY OF ARGUMENT

The Snyder Act, 25 U.S.C. §13, directs the Bureau of Indian Affairs to expend appropriations for "assistance of the Indians throughout the United States." The act gives the BIA no discretion to restrict that class of assistance recipients. The act's sole purpose was to stop individual Congressmen from striking, without a vote, parts of BIA appropriation bills which, contrary to House rules, had not been previously authorized. The Snyder Act supplies the needed all-inclusive authorization by making all Indians the beneficiaries of all appropriations. Congress may limit the class of assistance recipients in an appropriation act; but if it does not do so, the BIA must assist "the Indians throughout the United States," i.e. all Indians.

No recent BIA appropriation, including that for fiscal 1968, has limited BIA general assistance to on-reservation Indians. Congress has imposed express geographic limitations, however, on other programs funded in the same acts and on previous BIA welfare appropriations. BIA testimony to Congress on the Bureau's

service population has not been consistent; and even if it had been, the legislative history does not evidence Congressional ratification of the BIA's position. House and Senate committee reports do not support an on-reservation limit for BIA general assistance.

66 BIAM 3.1.4(A) which limits BIA general assistance to Indians on-reservation and in Alaska and Oklahoma is therefore void. It is not sanctioned by 25 U.S.C. §§2 and 9. Those laws do not authorize the BIA to assume substantive powers not granted by the Snyder and appropriation acts.

66 BIAM 3.1.4(A) is also unconstitutional. It denies BIA general assistance to off-reservation Indians, except in Alaska and Oklahoma, even though the constitutional basis for discrimination in favor of Indians is that "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them uneducated, helpless and dependent people" (Board of County Commissioners v. Seber, 318 U.S. 705). 66 BIAM 3.1.4(A) arbitrarily establishes a conclusive presumption that all off-

reservation Indians (outside Alaska and Oklahoma) are not needy despite their actual need. Section 3.1.4(A) may be constitutional to the extent that it assumes the state's on-reservation welfare burden, but this case does not involve BIA assistance which is in lieu of state general assistance. If the Ruizes were to prevail, the BIA would continue providing reservation Indians with an amount of general assistance equal to what the state would otherwise have to provide. Only BIA general assistance appropriations in excess of substitute-for-state payments would be redistributed among on and off-reservation Indians.

ARGUMENT

I

THE SNYDER ACT MAKES EVERY INDIAN ELIGIBLE FOR BIA PROGRAMS EXCEPT WHERE AN APPROPRIATION ACT LIMITS THE CLASS OF BENEFICIARIES

A general appropriation bill is out of order in the House of Representatives if it provides funds for anything not previously authorized except public works and "objects already in progress." (Rule XXI.2 of Rules of the House of Representatives in Deschler, Constitution,

Jefferson's Manual and Rules of the House of Representatives of the United States, Ninety-Second Congress, H.Doc.No. 439, 91st Cong., 2 Sess. (1971) (hereinafter cited as Deschler).) This was also true in 1921. (Deschler at 465.)

Prior to passage of the Snyder Act, 25 U.S.C. §13, in 1921, no authorization law existed for most Bureau of Indian Affairs programs. (S.Rpt.No. 294, 67th Cong., 1st Sess. (1921).) As a result, unauthorized appropriations had to be struck out if any Congressman raised a point of order. (Remarks of Representative Kelly, 61 Cong. Rec. 4659-4660 (Aug. 4, 1921); Remarks of Representative Carter, 61 Cong. Rec. 4671-4672 (Aug. 4, 1921).)

The purpose of the Snyder Act was to immunize Indian appropriation bills from points of order based on lack of authorization. (H.Rpt.No. 275, 67th Cong., 1st Sess. (1921); S.Rpt.No. 294, 67th Cong., 1st Sess. (1921); Remarks of Representative Kelly, 61 Cong. Rec. 4659 (Aug. 4, 1921).) The law effectuates that purpose by ennumerating a long list of authorized programs[2] and requiring the Indian Bureau to

2. General assistance welfare is clearly [footnote continued on next page]

"direct, supervise, and expend...[appropriated funds]... for the benefit, care, and assistance of the Indians throughout the United States."

This does not require appropriations for all the ennumerated programs nor for all Indians. Congress is free to appropriate as much or as little as it sees fit for any program; and Congress may, consistent with its own rules, specify that no part of a particular appropriation shall go to recipients lacking certain qualifications (Deschler, supra, at 471; Rule XVI.2 of the Standing Rules of the Senate in Senate Manual, S.Doc.No. 92-1, 92d Cong.,

---

within the authorizations for "general support" and "relief of distress." The Court need not decide whether the act authorizes only those programs which the BIA had in 1921. Supporters of the legislation said it would authorize no new Bureau activities. (Remarks of Represenative Carter, 61 Cong. Rec. 4672 (Aug. 4, 1921); Remarks of Representative Snyder, 61 Cong. Rec. 4684 (Aug. 4, 1921); Remarks of Senator Curtis, 61 Cong. Rec. 6529 (Oct. 21, 1921).) However, the Senate report incorporates and adopts a letter from the Acting Secretary of the Interior, who wrote: "[T]he bill in question would give Congress authority to appropriate for the expenses of the Indian service for all necessary activities...." (S.Rpt.No. 294, 67th Cong., 1st Sess. (1921) (emphasis added).)

1st Sess. (1971)). The starting point, though, is that all appropriations are for the "assistance of the Indians throughout the United States."

To have designated less than all Indians as beneficiaries of all appropriations would have allowed a point of order to be raised whenever unincluded Indians were added by an appropriation act. Thus, as a matter of logic, the Snyder Act could accomplish its purpose only be making all Indians beneficiaries.

In any event, the language of 25 U.S.C. §13 is clear beyond question. "[T]hroughout the United States" means "in or to every part of; everywhere in" the United States. (Random House Dictionary of the English Language 1480 (1967).) The Office of the Interior Department Solicitor wrote in 1971 that "Indians throughout the United States" means "any and all Indians, of whatever degree, whether or not members of federally recognized tribes, and without regard to residence so long as they are within the United States." (Memorandum from the Assistant Solicitor, Division of Indian Affairs, Department of the Interior to the Commissioner of Indian Affairs,

Dec. 9, 1971, reprinted in Sclar, Participation By Off-Reservation Indians In Programs Of The Bureau Of Indian Affairs And The Indian Health Service, 33 Mont.L.Rev. 191 (1972) (hereinafter cited as Sclar).) The statute's meaning is so plain that the Court need look at no additional materials to see if off-reservation Indians were included in the phrase "the Indians throughout the United States." (Ex Parte Collett, 337 U.S. 55, 61 (1949).)

The fact is, however, that off-reservation Indians had been receiving BIA services before the Snyder Act. (Commissioner of Indian Affairs, Report For The Year 1866 at 94 (1866); Commissioner of Indian Affairs, Report To The Secretary Of The Interior, 1908, at 17 (1909); see also Sclar, 33 Mont.L.Rev. 191, at 208, fn. 127.) The committee reports and debates on the Snyder Act did not discuss which Indians would be served under the new law, and no indication exists that Congress intended to cut off any then receiving assistance. The sweep of the act's language caused Congress no concern about service to urban Indians, because the number of urban Indians was then insignifi-

cant.[3]

Petitioner argues that the Snyder Act vests the Secretary of the Interior with discretion to affix tribal and geographic eligibility requirements on top of those set by Congress in enacting appropriations. (Brief For The Secretary at 8.) That contention is untenable.

Appropriations acts from the period prior to 1921 bespeak Congressional determinations of whether certain tribes or classes of Indians or Indians generally would be assisted by a particular appropriation. The Interior Secretary may have had substantial discretion over Indian affairs, but Petitioner cites nothing

---

3. The total United States Indian population in 1920 was 244,437. United States Department of Commerce, Bureau of the Census, Fourteenth Census of the United States Taken in the Year 1920, Population, Vol. II at 37 (1922).) The Indian population in cities of 100,000 or more was 1,970 or .8 of one percent of the total Indian population. (Id. at 47.) The Indian population in cities of 25,000 or more, including those of 100,000 or more, was 4,086 or 1.7% of the Indian population. (Id. at 75-76.) And using the census definition of urban as towns of 2500 or more (id at 20), the percentage of "urban" Indians in 1920 was still only 6.2%. (Id. at 89.)

showing that the Secretary had any power to modify the choices made by Congress.

The Snyder Act did not increase the Secretary's power. The act's sole purpose was to stop points of order to unauthorized appropriations. (Remarks of Representatives Andrews and Carter, 61 Cong. Rec. 4672 (Aug. 4, 1921).) Congress had no intention of surrendering control over which groups of Indians would share in appropriations; it was merely resolving a jurisdictional fight between the House's Indian Committee and that body's Appropriations Committee. (Remarks of Representative Carter, 61 Cong. Rec. 4671-4672 (Aug. 4, 1921).)

Since passage of the Snyder Act Congress has continued to indicate when an appropriation is only for one tribe or the Indians in certain areas. (See Part II, infra.) Petitioner's reading of the Snyder Act as vesting him with unbridled discretion would create what this Court has described as "a type of administrative absolutism not congenial to our lawmaking traditions." (Gutknecht v. United States, 396 U.S. 295, 306 (1970); see also Smith v. Director of Internal Revenue, 332 F.2d

671, 673 (9th Cir. 1964).) The correct interpretation of the Snyder Act is that Congress may, under its own rules, limit the class of beneficiaries during the appropriation process; but if Congress imposes no limit, the beneficiaries are "the Indians throughout the United States."

II

NEITHER THE FISCAL 1968 INTERIOR DEPARTMENT APPROPRIATION NOR SUBSEQUENT APPROPRIATIONS LIMIT BIA GENERAL ASSISTANCE TO ON-RESERVATION INDIANS

A. The Lack Of A Geographic Limit On Recent General Assistance Appropriations Contrasts Sharply With Geographic Limits On Other Programs In The Same Laws And On The General Assistance Program In Prior BIA Appropriations.

In fiscal year 1968, when this suit arose, the appropriation covering BIA general assistance provided: "For expenses necessary to provide education and welfare services for Indians...including...grants and other assistance to needy Indians... $126,478,000." (81 Stat. 59, 60.) The appropriations for subsequent years are identical except for the dollar amounts.[4]

---

4. In fiscal 1974 the fiscal 1968 appropriation is significant only as it illuminates the meaning of subsequent appropriations. [footnote continued next page]

(82 Stat. 425, 427; 83 Stat. 147, 148; 84 Stat. 669, 670; 85 Stat. 229, 230; 86 Stat. 508, 509.)

The acts contain only one limit on which "Indians throughout the United States" shall receive "assistance." That limit is "needy." The absence of any geographic limitation on assistance in those laws is in clear contrast to other programs in the same laws and to assistance provisions in prior BIA appropriations.

Each of the BIA general appropriation acts for fiscal years 1968 through 1973 provide reward money for information or evidence concerning violations of law "on Indian reservations and lands." (81 Stat. 59, 60; 82 Stat. 425, 428; 83 Stat. 147, 148; 84 Stat. 669, 670; 85 Stat. 229, 230; 86 Stat. 508, 509.) Each of those laws also appropriates funds for land acquisition with the proviso that "no part of the sum herein appropriated shall be used for the acquisition of land within the States of Arizona, California, Colorado, New Mexico, South Dakota, and Utah outside of the boundaries of existing Indian reservations except lands authorized

---

This brief accordingly uses subsequent acts and legislative history as aids in the process of interpreting BIA appropriation acts.

by law to be acquired for the Navajo Indian Irrigation Project." (81 Stat. 59, 61; 82 Stat. 425, 427; 83 Stat. 147, 149; 84 Stat. 669, 671; 85 Stat. 229, 231; 86 Stat. 508 510.)

In 1940 an emergency appropriation to the BIA provided $1,700,000 for "relief and rural rehabilitation for needy Indians." (54 Stat. 611, 617 (emphasis added).) The next year the House Appropriations Committee adopted the same approach for the regular BIA appropriations bill. That bill would have appropriated $1,000,000 "for general support and rural rehabilitation of needy Indians." (H.R. 4590, 77 Cong., 1st Sess., version of April 30, 1941 (emphasis added).) Then the following discussion took place before the Senate Appropriations Committee:

PROGRAM OF INDIAN SERVICE
WITH RESPECT TO NEEDY INDIANS

* * *

Senator McCarran...About 6 weeks ago I had this matter up in connection with the group of Indians at Yerington, or close to that point. As I recall, I was confronted with the reply that there was no money to meet the situation.

REHABILITATION FUNDS NOT AVAILABLE FOR RELIEF IN URBAN AREAS

Mr. Collier [Commissioner of Indian Affairs]. There is no authorization.

Senator McCarran. No authority?

Mr. Collier. No. This is the fund that would be used, but it is not applicable to urban groups, so that you would have to change the language of this authorization in order for us to reach them.

ADVISABILITY OF REHABILITATION WORK AMONG INDIANS IN URBAN AREAS

Senator McCarran. Why should there not be something of that kind done?

Mr. Collier. We think that it should be.

* * *

Senator McCarran. What is required; legislation?

Mr. Collier. It requires merely the change of the language in this particular appropriation.

Senator McCarran. Why don't we do it? Why should it not be done; because, really, after all, Mr. Commissioner, those are the Indians who should have the help. They are off

of the reservation and they are trying to make a living....

* * *

Mr. Collier. This is the appropriation which it would come out of. This provides for "General Support and rural rehabilitation of needy Indians." This committee could drop the word "rural."

* * *

Senator McCarran. If we dropped "rural"?

Mr. Collier. That is all that you would have to do, drop the word "rural."

Senator McCarran. Well, when they are living in little communities away out in the wilds, you might say, that is pretty nearly rural.

Senator Holman. Who interprets the meaning of "rural"? I think that a village is rural, is it not?

Mr. Collier. The Comptroller General interprets it and he always interprets pretty tightly. This committee has the remedy by dropping the word "rural."

Senator Holman. Would that be legislation? If it is not legislation, and it is in order, I would move that

Senator McCarran be authorized to present it on the floor.

LEGISLATIVE AUTHORITY FOR RELIEF WORK AMONG INDIANS

Senator Hayden. I think it would be well if you could place in the record legislative authority for the appropriation.

Mr. Greenwood [Finance Officer, BIA]. Legislative authority, Mr. Chairman, is in the Snyder Act of 1921, authorizing appropriations for the general support of Indians.

Senator Hayden. Then so far as legislative authority is concerned, we could appropriate anything for any Indians anywhere?

Mr. Greenwood. Yes, sir.

Senator Hayden. The word "rural" is limiting you here?

Mr. Greenwood. That is correct; yes, sir.

* * *

Senator McCarran. Let me see if I get it clearly, from what I understand to be your idea, or at least the Comprtroller General's idea, "rural" means living out in the country away from a settled community?

Mr. Greenwood. Yes, sir.

Senator McCarran. You will not find very many Indians following that line. As a rule they come into little centers. They live around the outskirts of little towns. Maybe they work out in the hayfields, or work out at one place or another, but they always live close together in some little town; that is, those not on a reservation. It does not seem to me that this money applies to Indian relief at all.

Senator Thomas. That would not apply in my State, Senator. We do not have those communities. They have their allotments along the creeks some place, and they do not live much around the towns.

Senator McCarran. We have a group of Indians in my State that live that way....Those who do not stay on the reservations simply work for somebody else, but live in close to little towns.

So, it does not seem to me that under that ruling the Indians would ever get anything, and they are not

> getting very much. Some of them are living in hovels that are dangerous to themselves and everybody else. (Hearings on H.R. 4590 before a subcommittee of the Senate Committee on Appropriations, 77th Cong., 1st Sess., at 159-162 (1941).)

As a result, the Senate Appropriations Committee voted the bill out with the word "rural" recommended for deletion. (S.Rpt.No. 366, 77th Cong., 1st Sess. at 3 (1941); H.R. 4590, 77th Cong., 1st Sess., version of June 2, 1941.) The senate agreed to delete "rural" (87 Cong. Rec. 4671 (June 3, 1941)) and the law was enacted without the "rural" restriction (55 Stat. 303, 305).

Besides textual contrasts within and between BIA appropriation laws, this Court has another reason for declining to read unexpressed geographic limitations into BIA appropriations for general assistance. House of Representatives' practice requires a limitation to show on the face of an appropriation act (Deschler, supra, at 476, ¶2); and the presumption is that the Congress

follows its own rules (United States v. Vulte, 233 U.S. 509, 515 (1914)). Moreover, the Congressional practice makes extremely good sense. A law represents the will of the whole House and the whole Senate. Those bodies cannot intend to adopt secret limitations of which most if not all Senators and Representatives are unaware.

B. Congress Has Not Ratified The BIA's General Assistance Policy By Not Expressly Repudiating It.

Petitioner claims (at page 15 of his brief) that two unpassed bills evidence an unstated Congressional understanding of geographic limits on BIA general assistance appropriations. Those bills are H.R. 9621, 87th Cong., 2d Sess. and H.R. 6279, 88th Cong., 1st Sess. Those bills would have declared that all Indians--whether on or off reservation--in certain states were eligible for BIA services. The bills would also have reimbursed the states for 80% of the state share of catagorical aid to Indians under the Social Security Act.

H.R. 9621 and H.R. 6279 were referred to committee (see 108 Cong. Rec. 74 (Jan. 11, 1962); 109 Cong. Rec. 8544 (May 14,

1963)), where they died. The record does not show whether they failed to pass because Congress disapproved of one or both of the basic provisions or because Congress considered such laws unnecessary for off-reservation Indians to receive BIA services. No significance whatsoever may be attached to Congress' inaction on those bills. (United States v. Wise, 370 U.S. 405, 411 (1962); Order of Railway Conductors v. Swan, 329 U.S. 520, 529 (1947).)

Petitioner also contends that Congress has silently ratified a BIA policy of providing general assistance only to reservation Indians. (Brief For the Secretary at 13-15.) This supposed ratification is based on three factors: (1) 66 BIAM 3.1.4(A), (2) testimony presented at seven hearings between 1922 and 1960, and (3) a sentence in the Bureau's annual justification statement that BIA general assistance is for "needy Indians on reservations."

66 BIAM 3.1.4(A) instructs BIA employees to provide general assistance only to Indians on reservations and in Alaska and Oklahoma. Nothing cited by Petitioner indicates that Congress ever knew of 66 BIAM 3.1.4(A). O BIAM 1.2.A

requires the Bureau to publish in the Federal Register "directives which relate to the public, including...directives [which] inform the public of privileges and benefits available; eligibility qualifications, requirements, and procedures," but 66 BIAM 3.1.4(A) has never received such publication. The failure to publish 66 BIAM 3.1.4(A) in the Federal Register also violates 5 U.S.C. §552(a)(1)(D&E). (Piercy v. Tarr, 343 F.Supp. 1120, 1128-29 (N.D.Cal. 1972).) The sanction for failing to publish the instruction is that:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner...be adversely affected ...(5 U.S.C. §552(a)(1).)[5]

Not a scintilla of evidence indicates that the Ruizes had knowledge of 66 BIAM 3.1.4(A) at the time the fiscal 1968 appropriation was being considered. And the vast majority of off-reservation Indians have not known about 66 BIAM 3.1.4(A) at any time.

---

5. The same rules applied under the predecessors of 5 U.S.C. §552(a)(1). (See 60 Stat. 237, §3(a); 44 U.S.C. §1507.)

Imputing knowledge of that instruction to Congress for the purpose of finding Congressional ratification would therefore be an adverse affect proscribed by 5 U.S.C. §552. (Cf. Borak v. Biddle, 141 F.2d 278, 280 (D.C. Cir. 1944); Berends v. Butz, 357 F.Supp. 143 (Minn. 1973).)

The testimony relied on for ratification (Brief For The Secretary at 14-15) is inapposite. First, the testimony in question was given between 1922 and 1960, not during 1967 hearings on the fiscal 1968 appropriation. To impute testimony from one year not only into the testimony but also the legislation of another year flies in the face of United States v. Vulte, supra, 233 U.S. 509 at 514-515, which holds that a limitation in one year's appropriation act is presumed not to apply to appropriations in subsequent years.

Secondly, in three of the seven cited hearings the testimony does not show a denial of BIA general assistance to off-reservation Indians. Two instances, in fact, show just the opposite.

One cited set of hearings is on the fiscal 1942 appropriation bill. Those are the same hearings which are quoted extensively on pages 16 to 21 supra, and which

show clearly that Congress expected off-reservation Indians to receive BIA general assistance. Petitioner points to a subsequently filed BIA statement found on pages 465-466 of those hearings. That statement reads in part:

> In the event the committee considers it advisable to eliminate the word "rural" from the language of the item appropriating funds for "General support and rural rehabilitation of needy Indians," the Indian Service would be able to extend a limited amount of assistance to groups of Indians residing in urban communities.
>
> * * *
>
> In view of the small amount available and the fact that a far greater number of Indians reside in rural areas than in urban communities, it is believed that in no event should more than 10 percent, or $50,000 be expended for rehabilitating Indians who are not using the land for their support.

The statement is fully consistent with general assistance to off-reservation Indians. Urban Indians would obviously

receive a small part of the money if a "far greater number of Indians reside[d] in rural areas." Moreover rural does not mean reservation. (Remarks of Senator Thomas, supra, at page 20.)

A second portion of testimony relied on by Petitioner to find ratification of a no off-reservation policy is pages 483 and 492 of Hearings on H.R. 3838 before a subcommittee of the Senate Committee on Appropriations, 81st Cong., 1st Sess. (1949). On page 483 Senator Young says: "When they [Indians] do leave [the reservation] and then run short of funds and find that they are not eligible for relief, they quite naturally drift back to their home reservation." The relief referred to was not BIA general assistance but state and local general relief from which Indians were barred by residence requirements. That is made quite clear by the following BIA statement appearing at page 592 of the hearings:

> "This supplemental request is...in order to permit adequate relief payments to needy Indians on reservations and temporary relief to those off the reservation until they meet local residence requirements...."

(Emphasis added.)

The third instance of cited testimony not supporting Petitioner's position is "Hearings [on the Interior Department Appropriation Bill, 1924], H.Committee on Appropriations, 67th Cong., 4th Sess. pp. 184-185 (1922)." Nothing on the cited pages deals with the subject of welfare services to off-reservation Indians. The BIA did testify on page 183 that "we expended a good part of that [BIA relief] appropriation in relieving distress of Indians on reservations." In 1922, however, a substantial majority of Indians lived on reservations.

The third and last cog on Petitioner's wheel of ratification is a sentence reading: "General assistance will be provided to needy Indians on reservations." The sentence has appeared for a number of years in the Bureau's appropriation justification statements[6] (Brief For The Secre-

---

6. More recently the justification statement has also said: "The Federal Government has assumed responsibility for providing financial assistance and other social services to needy residents of reservation communities. (Hearings on Department of the Interior and Related Agencies Appropriations For 1973 before a subcommittee of the House Committee on Appropriations, 92 Cong., 2d Sess., Part 2 at 60 (1972); Hearings [footnote continued on next page]

tary at 13-14), where it is buried amidst scores of pages of tiny type.

Congressional ratification of that sentence or 66 BIAM 3.1.4(A)[7] cannot be inferred from Congress' failure to repudiate the sentence or from Congress' appropriation to the Bureau of a lump sum for general assistance and other BIA programs. What this Court said in Ex Parte Endo, 323 U.S. 283 (1944), is applicable here:

> "It is argued, to be sure, that there has been Congressional ratification of the detention of loyal evacuees under the leave regulations of the Authority through appropriation of sums for expenses of the Authority. It is pointed

---

on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1973 before a subcommittee of the Senate Committee on Appropriations, 92d Cong. 2d Sess., Part 1 at 151 (1972) (Emphasis added).)

7. Petitioner does not make clear whether Congress is supposed to have ratified the sentence, which restricts general assistance to reservation Indians, or 66 BIAM, which restricts general assistance to Indians on reservations and in Alaska and Oklahoma. And see footnote 6, supra.

out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. And it is shown that the leave program of the authority was mentioned both in the House and Senate Committee hearings on the 1944 Appropriation Act and on the floor of the House prior to passage of the 1944 Act. Congress may of course do by ratification what it might have authorized. And ratification may be effected through appropriation acts. But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program. (Id. at 303, fn. 24 (citations omitted).)

See also, Greene v. McElroy, 360 U.S. 474, ~~1308-1390~~, fn. 30, particularly the last

sentence; D. C. Federation of Civic Associations, Inc. v. Airis, 391 F.2d 478, 481-482 (D. C. Cir. 1948).)[8]

C. The Legislative History Of Recent BIA Appropriations Does Not Support A Reservation Only Policy For BIA General Assistance.

Petitioner's selections from the legislative history give an incomplete picture of BIA testimony and totally omit the testimony of other witnesses, floor debate, and committee reports. Some of the relevant omissions are as follows.

The Bureau of Indian Affairs has testified at numerous appropriation hearings that its service population includes all Indians living on or near reservations.[9]

---

8. The cases cited by Petitioner (at page 15 of his brief) in support of ratification are clearly distinguishable. Both involved authorization laws with an indefinite lifetime not one year appropriations. Moreover both involved the ratification of properly adopted regulations.

9. Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1965 before a subcommittee of the Senate Committee on Appropriations, 88th Cong., 2d Sess, at 42 (1965); Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year [footnote continued on next page]

In 1971 Congressman Donald Fraser submitted a long statement on urban Indians at the House hearings. The statement said in part:

> "I've found that no congressional mandate specifically ties the BIA and the IHS to trust land and there is virtually no legislative history in this area. Assistant Secretary Loesch finally admitted last year that the hands off policy regarding urban Indians was based on informal

---

1968 before a subcommittee of the Senate Committee on Appropriations, 90th Cong., 1st Sess., at 819 (1967); Hearings on Department of the Interior and Related Agencies Appropriations For 1969 before a subcommittee of the House Committee on Appropriations, 90th Cong., 2d Sess., Part 2 at 575 (1968); Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1969 before a subcommittee of the Senate Committee on Appropriations, 90th Cong., 2d Sess., at 368 (1968); Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1971 before a subcommittee of the Senate Committee on Appropriations, 91st Cong., 2d Sess., at 1939 (1970); Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1972 before a subcommittee of the Senate Committee on Appropriations, 92d Cong., 1st Sess., at 751-752 (1971).

understandings with the Congressional appropriations committees.... I have finally come to realize that the Bureau's approach to urban Indians is based on certain policy assumptions that have not been articulated." (Hearings on Department of the Interior and Related Agencies Appropriations for 1972 before a subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess., Part 6 at 101 (1971).)

In reply Congresswoman Julia Butler Hansen, Chairwoman of the Interior appropriations subcommittee said:

"I notice in your statement you say, 'Assistant Secretary Loesch finally admitted last year the 'hands off' policy regarding urban Indians was based on informal understandings with the congressional appropriations committees.' This is not true. Assistant Secretary Loesch has never reached any understanding in that connection with this committee. This was the first year that we discussed this problem in detail with the BIA (Id. at 104.)

Congressman Fraser responded:

> "My understanding is that there is nothing in the existing statutory language which would keep the BIA or the IHS from being concerned with the Indians who live off the reservation...." (Id. at 105.)

Mrs. Hansen's rejoinder was

> "Our appropriation bill has never carried a limitation on expenditures concerning Indians." (Id. at 107.)

(See also Testimony of Senator John Tunney, Hearings on Department of the Interior and Related Agencies Appropriations for Fiscal Year 1973 before a subcommittee of the Senate Committee on Appropriations, 92d Cong., 2d Sess., at 3415-3417, 3422, 3423, and 3429; Testimony of Grace Thorpe, id. at 3774; Testimony of Lee Sklar [sic], id. at 3781-3782; Statement of Senator Alan Cranston, id. at 4236-4237.)

On June 27, 1973, Chairwoman Hansen addressed the House on behalf of the 1974 Interior Department Appropriation. She said: "The boundaries of this committee's responsibility...encompass...the welfare and education of approximately 600,000 American Indians in and adjacent to the

reservation world....". (119 Cong. Rec. H5490.)

Finally, the appropriations committees' reports do not support limiting BIA general assistance to reservation Indians. For fiscal years 1967 and 1968 the reports were as silent as the statutes.[10] For fiscal 1969, the House report (No. 1395, 90th Cong., 2d Sess. (1968)) suggested no limitation. The Senate report described the appropriation as being for "the 400,000 Indians under the jurisdiction of the Bureau of Indian Affairs." (S.Rpt.No. 1275, 90th Cong., 2d Sess. at 6 (1968).) Those 400,000 were the Indians and Alaska Natives whom the BIA characterized as "on or near reservations." (Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1969 before a subcommittee of the Senate Committee on Appropriations, 90th Cong., 2d Sess., at 368 (1968).) The conference report did not resolve the disparity between the

---

10. H.Rpt.No. 1405, 89th Cong., 2d Sess. (1966); S.Rpt.No. 1154, 89th Cong., 2d Sess. (1966); H.Rpt.No. 1538, 89th Cong., 2d Sess. (1966); H.Rpt.No. 206, 90th Cong., 1st Sess. (1967); S.Rpt.No. 233, 90th Cong., 1st Sess. (1967); H.Rpt.No. 343, 90th Cong., 1st Sess. (1967).

House and Senate reports. (H.Rpt.No. 1664, 90th Cong., 2d Sess. (1968).)

The committee reports recommended no limitation on BIA welfare for fiscal years 1970 and 1971.[11] In 1971 the House report for fiscal 1972 said: "While the Bureau's primary responsibility is to assist Indians living on reservations, the Bureau can and should do more to assist Indians to adjust to city living." (H.Rpt.No. 92-308, 92d Cong., 1st Sess, at 9.) The Senate report for the same year stated that the recommended appropriation was for "the 477,500 Indians under the jurisdiction of the Bureau of Indian Affairs living on or near reservations." (S.Rpt.No. 92-263, 92d Cong., 1st Sess., at 5 (1971).) The conference report attempted no reconciliation on this point. (H.Rpt.No. 92-386, 92d Cong., 1st Sess. (1971).)

The 1972 House report appeared to sanction for fiscal 1973 the Bureau policy of denying general assistance to

---

11. H.Rpt.No. 361, 91st Cong., 1st Sess. (1969); S.Rpt.No. 420, 91st Cong., 1st Sess. (1969); H.Rpt.No. 570, 91st Cong., 1st Sess. (1969); H.Rpt.No. 91-1095, 91st Cong., 2d Sess. (1970); S.Rpt. No. 91-985, 91st Cong., 2d Sess. (1970); H.Rpt.No. 91-1321, 91st Cong., 2d Sess. (1970).

urban Indians.[12] (H.Rpt. 92-1119, 92d Cong., 2d Sess., at 6-7.) The Senate Report for fiscal 1973 held to its 1972 view that the BIA appropriation is for Indians "on or near reservations." (S.Rpt.No. 92-921, 92d Cong., 2d Sess. at 6 (1972).) The Senate report also directed the Secretary of the Interior to "prepare a plan to assure Bureau of Indian Affairs type services to all Indians in the United States--rather than just those living 'on or near reservations.'" (Ibid.) The House and Senate reports were probably expressing the same intent in different language. The conference report is

12. The term urban as used by the committee means metropolitan centers rather than urban in the Census Bureau sense. House Committee Chairwoman Hansen considers 600,000 Indians to be non-urban. (See 119 Cong. Rec. H5490 (June 23, 1973).) The Census considers only 467,753 to be rural. (See Sclar, supra, 33 Mont.L.Rev. at 194, fn. 7 and 195, fn. 9; see also Hearings on Department of the Interior and Related Agencies Appropriations for Fiscal Year 1972 before a subcommittee of the Senate Committee on Appropriations, 92d Cong., 1st Sess., at 756 (1971); Testimony of James Hawkins, Director of Education Programs BIA, in Hearings on Department of the Interior and Related Agencies Appropriations For 1973 before a subcommittee of the House Committee on Appropriations, 92d Cong., 2d Sess., Part 2 at 75 (1972).)

silent. (H.Rpt.No. 92-1250, 92d Cong., 2d Sess. (1972).)

For fiscal 1974 the House report returns to its fiscal 1967-1968 approach. It says nothing about which needy Indians shall receive BIA welfare. (H.Rpt.No. 93-322, 93d Cong., 1st Sess. (1973).)[13]

Any assessment of the committee reports--and the debates and testimony--should bear in mind that the Interior Department appropriations acts are not ambiguous. Those laws contain geographic limits on some BIA programs but not on general assistance. The reports should therefore be irrelevant. (Ex Parte Collett, supra, 337 U.S. 55 at 61.) But if the reports are considered, each should be applied only to the appropriation it recommends; and not one report limits BIA general assistance to reservation Indians.[14]

---

13. The Senate had not acted on the fiscal 1974 BIA appropriation at the time this brief was written.

14. If the Court for some reason considers the appropriations statutes ambiguous, it should then apply the rule that laws affecting Indians will be construed in the way most favorable to the Indians. (Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912).)

III

66 BIAM 3.1.4(A) IS INCONSISTENT WITH THE SNYDER ACT, UNAUTHORIZED BY APPROPRIATION STATUTES, AND THEREFORE VOID

The Snyder Act, by its terms, makes geography irrelevant to BIA general assistance except when an appropriation act imposes a residency restriction. (Part I, supra.) No recent general assistance appropriation contains any geographic limit; and even those committee reports which specify beneficiaries include Indians near to as well as on reservations. (Part II, supra.) Neither the Snyder and appropriation acts nor their legislative histories evince any Congressional intent to vest the BIA with discretion to impose geographic limitations.

66 BIAM 3.1.4(A), which limits BIA general assistance to Indians on reservations and in Alaska and Oklahoma, is out of harmony with that statutory scheme and therefore void. (Manhattan General Equipment Company v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936); see also NLRB v. Brown, 380 U.S. 278, 291-292 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946).)

66 BIAM 3.1.4(A) is not sanctioned by 25 U.S.C. §§2 and 9. Sections 2 and 9 do not authorize the BIA to assume substantive powers not granted by the Snyder and appropriation acts. (Organized Village of Kake v. Egan, 369 U.S. 60, 63 (1962); Leecy v. United States, 190 Fed. 289, 292-293 (8th Cir. 1911).)

Petitioner contends that he must adopt eligibility rules for BIA general assistance. (Brief For The Secretary at 16.) Certainly that is true. The appropriation laws say that only "needy Indians" may share, and the Secretary thus has implied power to define need. The power to impose geographic criteria is withheld however. (Cf. Townsend v. Swank, 404 U.S. 282, 286 (1971).)

Petitioner further contends that he would have to "substantially diminish" general assistance to Indians on reservations if he must provide general assistance to off-reservation Indians. (Brief For The Secretary at 18.) That does not follow. The Ruizes do not challenge 66 BIAM 3.1.4(A) because it causes reservation Indians to receive BIA general assistance in amounts equal to what off-reservation Indians receive from state

programs. What respondents object to is that on-reservation Indians receive additional benefits which off-reservation Indians do not receive from the state. General assistance benefits to on-reservation Indians would not have to be "substantially diminish[ed]" if BIA maximum grant rules were to provide that on-reservation Indians would receive no more than the combined payments to off-reservation Indians by the BIA and state governments.[15]

66 BIAM 3.1.4(A) is not entitled to deference as a consistent and longstanding administrative interpretation of BIA powers. As an interpretation of appropriation acts covering BIA general assistance, it is inconsistent with BIA regulations for other programs made pursuant to the same lump sum appropriation. (25 C.F.R. §§31.1, 32.1.) Section 3.1.4 (A)'s inclusion of off-reservation

---

15. Petitioner also makes the related argument that "Congress had no intention of substantially increasing the scope of existing and proposed service" when it failed to appropriate all that the BIA requested for fiscal 1968. That contention erroneously assumes, among other things, that Congress appropriated general assistance funds in fiscal 1967 only for reservation Indians.

Indians in Alaska and Oklahoma is inconsistent with BIA statements to Congress that only reservation Indians receive general assistance; and 3.1.4(A)'s denial of general assistance to any off-reservation Indians except in Alaska and Oklahoma is inconsistent with BIA testimony that the Bureau serves Indians on or near reservations. BIA treatment of off-reservation Navajos in the Navajo area as on-reservation (Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1972 before a subcommittee of the Senate Committee on Appropriations. 92d Cong., 1st Sess. at 753 (especially the table of Estimated Indian Population) (1971)) is not consistent with 66 BIAM 3.1.4(A). The BIA has even carried out a program of down payments on urban Indian houses as part of the welfare program authorized by the Snyder Act. (See Sclar, supra, 33 Mont.L.Rev. 191 at 216.) Such an erratic performance is entitled to no deference, particularly as it is inconsistent with the intent of Congress. (Federal Maritime Commission v. Seatrain Lines, ___, U.S. ___, ___, 36 L.Ed. 2d 620, 634 (1973).)

Any doubts as to the validity of 66 BIAM 3.1.4(A) should be resolved against validity because of the section's doubtful constitutionality. (See Part IV, infra; Townsend v. Swank, supra, 404 U.S. 282 at 291.)

IV

66 BIAM 3.1.4(A) ARBITRARILY EXCLUDES OFF-RESERVATION INDIANS FROM BIA GENERAL ASSISTANCE IN VIOLATION OF THE FIFTH AMENDMENT

In Board of County Commissioners v. Seber, 318 U.S. 705 (1943), this Court held constitutional a federal law which exempted from state taxation certain off-reservation, non-trust, individually owned, Indian land. The source for that unique power to discriminate in favor of Indians was that "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people." (Id. at 715.)

Off-reservation Indians epitomize that plight. Whether rural or urban, a great many are poor;[16] and they are land-

16. Johnson, American Indians In Rural Poverty in Toward Economic Development For Native American Communities, A Compendium of Papers Submitted to the Subcommittee [footnote continued on next page]

less because of federal action.[17]

Some off-reservation Indians, as in California, never received reservations. (Sclar, supra, 33 Mont.L.Rev. at 221-222.) Nevada Indians have outgrown some tiny reservations established for them. (Remarks of Senator Bible, 117 Cong.Rec. S2409 (Mar. 4, 1971).) Substantial numbers of Indians have been displaced by the condemnation or involuntary sale of valuable reservation land. (Cahn, Our Brother's Keeper: The Indian In White America 69-73 (1969).) Many Indians are landless because

---

on Economy In Government of the Joint Economic Committee, Congress of the United States, 91st Cong., 1st Sess. (Comm.Print 1969) at Vol. I, p.19, 31-35; United States Department of Agriculture, Economic Research Service, Rural Indian Americans In Poverty (Agricultural Economic Report No. 167) at 11 (1969); President Nixon's Message To Congress On Indian Affairs of July 8, 1970, 6 Weekly Compilation of Presidential Documents 894 ("Three-fourths [of urban Indians] are living in poverty"); Testimony of Charles N. Zellers, Assistant Commissioner of Education, BIA, in Hearings on Department of the Interior and Related Agencies Appropriations For 1970 before a subcommittee of the House Committee on Appropriations, 91st Cong., 1st Sess., Pt. 2 at 93 (1969).

17. Reservation Indians too are victims of the Government's land policy, because the reservation lands left to them, with a few exceptions, are inadequate to their needs.

of the Government's now discredited allotment program. (Id. at 73-75; Sclar, supra, 33 Mont.L.Rev. at 222.) The BIA considers other thousands of Indians off-reservation because, through accidents in the historical maturation of the United States, their reservations developed special relationships with state governments. (See e.g., United States Department of the Interior, Federal Indian Law 965-979 (1958).) And finally, the BIA has encouraged, if it has not actually coerced, several hundred thousand Indians to move to urban areas.[18] That relocation was initiated because Congress believed both that more Indians were

---

18. Testimony of Milford M. Sanderson, President, American Indian Forum, Hearings on Department of the Interior and Related Agencies Appropriations For 1973 before a subcommittee of the House Committee on Appropriations, 92d Cong., 2d Sess., Pt. 5 at 488; Testimony of Congressman Donald Fraser, Hearings on Department of the Interior and Related Agencies Appropriations For 1972 before a subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess., pt. 6 at 100, 101, 104; Testimony of Senator Fred Harris, Hearings on Department of the Interior and Related Agencies Appropriations For Fiscal Year 1972 before a subcommittee of the Senate Committee on Appropriations, 92d Cong., 1st Sess., at 3074.

living on reservations than the land could support and that relocation to cities was the only practical solution for that situation. (S.Rpt.No. 2664, 84th Cong., 2d Sess. 2-3 (1956).)

Despite the Government displacement and the poverty it has engendered and despite those two factors being the constitutional basis for special benefits to Indians, 66 BIAM 3.1.4(A) totally excludes off-reservation Indians from BIA general assistance except in Alaska and Oklahoma.

Petitioner defends that rule as being reasonably related to factors which contribute to need. (Brief For The Secretary at 20-21.)[19] The record in this case, however, contains no evidence showing that off-reservation Indians have an economic advantage over on-reservation Indians. Not even the non-evidentiary authorities cited by Petitioner (at page 21, fn. 14 of his brief) attempt a comparison between the resources and employment opportunities of on and off-reservation residents.

---

19. The listed factors are remote places with inadequate resources, a lack of job opportunities, and chronic unemployment.

What 66 BIAM 3.1.4(A) really establishes is a conclusive presumption that all off-reservation Indians (outside Alaska and Oklahoma) have incomes and assets above the standards of need for BIA general assistance. The Ruiz' actual need (Statement Of The Case, supra, at 4) and the stated statutory purpose "to provide...assistance to needy Indians" are rendered irrelevant. 66 BIAM 3.1.4(A) operates just as arbitrarily as the total exclusion of tax dependents from food stamps which this Court declared in violation of the Fifth Amendment in United States Department of Agriculture v. Murry, ____ U.S. ____, 41 U.S. Law Week 5099 (1973).

Equally invalid are the other rationales which petitioner advances in support of constitutionality for 66 BIAM 3.1.4(A).

"Off-reservation Indians have equal access [with non-Indians] to ordinary state and federal benefits" (Brief For The Secretary at 21), but on-reservation Indians are equally entitled to social security and state welfare (Acosta v. San Diego County, 272 P.2d 92 (Cal.App. 1954); State Board of Public Welfare v.

Board of Commissioners of Twain County, 137 S.E. 2d 801 (N.C. 1964); United States Department of the Interior, Federal Indian Law 540, fn.6 (1958); cf. Begay v. Sawtelle, 88 P.2d 999 (Ariz. 1939)). Petitioner himself recognizes the equal welfare rights of on-reservation Indians at pages 7 and 8 of his brief. That the United States may constitutionally assume states' on-reservation welfare responsibilities in recognition of the tax-exempt status of recipients' land and income is not disputed,[20] but this case does not involve that issue. The states would bear no extra burden if the Ruizes were to obtain BIA benefits which Arizona does not provide to off-reservation residents. The BIA would continue providing reservation Indians with an amount of general assistance equal to what the states would otherwise have to provide. Only the BIA general assistance appropriations in excess of the substitute-for-state payments would be redistributed among on and off-reservation Indians.

---

20. The United States has no obligation to assume the burden of state programs. (Board of County Commissioners v. Seber, supra, 318 U.S. 705 at 718; Acosta v. San Diego County, supra, 272 P.2d 92 at 98.

"Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law." (Brief For The Secretary at 20 quoting Mescalero Apache Tribe v. Jones ___ U.S. ____, ____, 36 L.Ed. 2d 114, 119 (1973) "[A]nd [on a reservation] the authority of the state is less." (Brief For The Secretary at 20.) The states' general authority on and off-reservation has nothing to do with welfare, though, as explained in the preceding paragraph.

Making BIA general assistance available to off-reservation Indians would, according to Petitioner, "provide benefits to fully assimilated Indians not based on any special relationship with the government and denied to the citizenry at large." (Brief For The Secretary at 18.) Once again, the record contains nothing to show that off-reservation Indians are "fully assimilated." To the contrary, the record shows that the Ruizes and other off-reservation Papagos are not assimilated. (Statement Of The Case, supra; A.84-87; and see Sclar, supra, 33 Mont.L. Rev. 220 at footnotes 217-219 and the material cited therein.) The special

relationship which justifies providing special benefits to off as well as on-reservation Indians and not to non-Indians is that set out in Seber, supra: "[T]he United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people."[21]

Petitioner suggests that he has a special trust responsibility to provide welfare for reservation Indians. (Brief For The Secretary at 20.) In fact, the United States has a duty to care for all Indians. (Goodrich, The Legal Status of The California Indian, 14 Calif.L.Rev. 157, 163 (1926); see also the authorities cited in Sclar, supra, 33 Mont.L.Rev. at 203, fn. 96.)

Another insubstantial argument by petitioner is his statement that: "Indians who live on reservations have submitted themselves to a different governmental structure...where the authority of the Secretary of the Interior is greater." (Brief For The Secretary at 20.) Criminal

---

21. 25 U.S.C. §13 is, of course, an exception to 42 U.S.C. §2000d.

and civil jurisdiction are unrelated to the need for welfare; the Secretary's control over tribal trust property is the same whether a tribal member lives on or off-reservation; and the Secretary's control of individual trust property is similarly independent of residence.

Petitioner's final defense to the unconstitutionality of 66 BIAM 3.1.4(A) is that making BIA general assistance available to all Indians would "substantially diminish" the benefits available to reservation Indians who "depend more on the tribal government and the federal government." (Brief For The Secretary at 18, 20.) No such substantial diminution is likely. As explained at pages 40-41, the Ruizes and the class of off-reservation Indians they represent are seeking only the difference between what they receive from the state and what reservation Indians receive from the BIA. No reservation Indian would receive less than the state provides to off-reservation Indians. Beyond that, the cost in dollars to the federal government or in benefits to reservation Indians cannot justify the otherwise invidious exclusion of off-reservation Indians from the BIA general

assistance program. (Graham v. Richardson, 403 U.S. 365, 374-375 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).)

Viewed as a classification rather than as an irrebuttable presumption, 66 BIAM 3.1.4(A) is no more reasonable. No evidence in this case indicates reservation residence causes Indians to be poorer. No Indians could be more "helpless and dependent" because the United States "took possession of their lands" (Seber, supra) than those Indians whose land was actually taken or those who were forced to move off reservations after the Government left too little decent land to support all the members of their tribes.

Particularly inexplicable is why off-reservation Indians in Alaska and Oklahoma are in the same class with reservation Indians while all other off-reservation Indians are in another class. Petitioner's principal justification seems to be that Alaska and Oklahoma have historically received special treatment. (Brief For The Secretary at 21.) The BIA general assistance program did not include off-reservation Alaska Natives and Oklahoma Indians until 1959, however.[22] And a

22. The 1952 [footnote continued on next page]

history of discriminating against off-reservation Indians in most states is no justification for continuing that discrimination. (Brown v. Board of Education, 347 U.S. 483 (1954).)

Petitioner says that Alaska and Oklahoma have many Native Americans and few reservations, but he does not explain how those factors relate to need. California and North Carolina also have substantial Indian populations and little reservation land. Oklahoma Indian populations may be "concentrated" on tax-exempt trust land, as petitioner claims (Brief For The Secretary at 21); but, as explained on page 48, supra, a judgment for the Ruizes will impose no new burden on state welfare programs. The "substantial separate legislation" covering Alaska and Oklahoma, like the Interior Secretary's greater authority on than off reservation (see pages 50-51

---

version of 66 BIAM 3.1.4(A) read: "Assistance under the Bureau's program shall be limited to otherwise eligible Indians residing on reservations." (Indian Affairs Manual, Vol. VI, Part VI, Ch. 3, Section 301.03.) The 1952 provision was changed in 1959 to read: "Assistance under the Bureau's program is limited to otherwise eligible Indians residing on reservations and in jurisdictions under the Bureau of Indian Affairs in Alaska and Oklahoma. (66 IAM 3.1.3.)

supra), does not make off-reservation Alaska Natives and Oklahoma Indians needier than their counterparts in other states.

> "'Traditional' equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety.' Dandridge v. Williams, supra, at 485. But the classification here in issue is not only 'imprecise'; it is wholly without any rational basis." United States Department of Agriculture v. Moreno, _____U.S. ____, ____, 41 U.S. Law Week 5105, 5110 (1973).)

Moreover, 66 BIAM 3.1.4(A) should be judged not just by traditional equal protection analysis, but by a stricter standard. Whether Indians live on or off reservations has essentially been determined by the federal government. That is obvious where, as in California, a tribe or band never received any land. But it is no less true where, as in the Ruiz case, the land left to the Indians was so meager or so unproductive that it could not support all its residents and some had to move off if either

those remaining or those departing were to have any chance for self-sufficiency.

For the federal government to then place Indians in a disadvantaged class for being off-reservation is "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility." (New Jersey Welfare Rights Organization v. Cahill, ____ U.S. ____, ____, 36 L.Ed.2d 543, 545 (1973), quoting Weber v. Aetna Casualty & Ins. Co., 406 U.S. 164, 175, (1972); Frontiero v. Richardson, ____ U.S. ____, ____, 36 L.Ed. 2d 583, 591 (1973).) Therefore, the classification is "inherently suspect, and must...be subjected to strict judicial scrutiny." (Frontiero v. Richardson, supra, ____ U.S. ____ at ____ - ____; 36 L.Ed. 2d 583 at 589-592.) Given that scrutiny, 66 BIAM 3.1.4(A) is plainly unconstitutional.

CONCLUSION

For the foregoing reasons the Court of Appeals' decision should be affirmed.

Dated: Aug. 3, 1973

Respectfully submitted,

Lee J. Sclar
Bruce R. Greene
Herbert A. Becker

CALIFORNIA INDIAN LEGAL SERVICES

By: _____
Lee J. Sclar

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1052

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR,

Petitioner

v.

RAMON RUIZ AND ANITA RUIZ

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

WINTON D. WOODS, JR.
University of Arizona
College of Law
Tucson, Arizona 85721

LINDSAY E. BREW
P.O. Box 246
Sells, Arizona 85634

Counsel for Respondents

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

Congressional material:

Senate:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1052

ROGERS C. B. MORTON,
SECRETARY OF THE INTERIOR,

Petitioner

v.

RAMON RUIZ AND ANITA RUIZ

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether an unassimilated Papago Indian residing near the Papago Indian Reservation and within his tribe's aboriginal land may be automatically excluded from participation in the General Assistance Program of the Bureau of Indian Affairs on the sole ground that he does not reside within the legal boundary of the reservation.

STATEMENT

While the respondents do not argue with the bare facts contained in the Secretary's Statement they would focus the attention of the Court upon certain background data which give meaning and perspective to those facts.

As reference to Appendix A, *infra*, will reveal respondents have remained in the central portion of the land to

which their tribe held aboriginal title which is called "Papagueria" or Land of the Papagos. They reside in a community known as "Indian Village" within the town of Ajo, Arizona. Indian Village (not the town of Ajo, as the Secretary states, Opening Brief 4-5) is populated almost entirely by Papago Indians. See: Fact 5, App. 45. The off reservation Papagos, including respondents, have not been assimilated into the dominent culture and they have retained their language and tribal identity. See: Exhibit A to Plaintiff's Cross-Motion for Summary Judgment (hereinafter refered to as the "Stucki Affidavit") at App. 84-88.

Economic conditions on the Papago Reservation are among the worst in the United States:

> The Papagos, whose arid and lonely territory borders Mexico, remain in the ranks of the most economically depressed of all American groups, although the possibility of mineral development now offers some hope. Scattered and only loosely related small villages, in an area of the state that has been slow to develop economically, has made community development all but impossible. Bennett, *Problem and Prospects in Developing Indian Communities*, 10 Ariz. L. Rev. 649 (1968)

As a result of the lack of economic opportunity on the reservation many Papagos are forced to seek employment in Anglo communities near the reservation, where they again find their job opportunities limited:

> On all reservations studied in the State of Arizona a clear pattern emerged: Indians are denied equal access to jobs and job promotion in all levels of private industry located on or near reservations and in bordertowns surrounding reservations. U.S. Commission on Civil Rights, *The Southwest Indian Report* (USGPO 1973)

In sum, respondents are economically deprived unassimilated Papago Indians, residing in an Indian commu-

nity located in the central portion of the land that has always been occupied by their tribe.

SUMMARY OF ARGUMENT

While the Snyder Act was promulgated to insure continuity in the appropriations process it nonetheless constitutes the fundamental authority under which the BIA expends its funds. Since the language of the act is plain and mandatory the Secretary must follow it unless Congress has by later legislation clearly indicated its intent to modify the Snyder Act mandate. The various appropriations acts, including specifically the 1968 Act, contain no language indicating such an intent. Moreover, there is no basis upon which the Court can infer that intent since the presentations made to the Appropriations Committees have been unclear and contradictory. The internal agency instruction (66 IAM 3.1.4) itself cannot serve as a basis for that inference since it has not been made public in accordance with stated Bureau of Indian Affairs policies and procedures.

Even if the Court were to infer Congressional limitation through later legislation, the limitation as applied to respondents deprives them of equal protection of law and infringes upon their fundamental right to travel throughout their historic tribal territory.

ARGUMENT

I.

THE SNYDER ACT CONSTITUTES THE FUNDAMENTAL CONGRESSIONAL MANDATE TO THE SECRETARY OF THE INTERIOR IN REGARD TO INDIAN AFFAIRS AND THE SECRETARY HAS NO AUTHORITY TO VIOLATE THAT MANDATE UNLESS CONGRESS HAS MODIFIED IT BY LATER LEGISLATION.